

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR ISREAL MACIAS,

Defendant and Appellant.

D055686

(Super. Ct. No. INF060927)

APPEAL from a judgment of the Superior Court of Riverside County,

Michael B. Donner, Judge. Affirmed.

INTRODUCTION

A jury found Hector Isreal Macias guilty of possession of marijuana for sale (Health & Saf. Code, § 11359), and of transportation of more than 28.5 grams of marijuana (Health & Saf. Code, § 11360, subd. (a)). The trial court sentenced Macias to four years in state prison.

Macias appeals, arguing the trial court prejudicially erred by allowing the prosecutor to elicit inadmissible profile evidence against him. We conclude there is no merit to this contention and affirm the judgment.

## BACKGROUND

### *Prosecution Evidence*

Two State of California Bureau of Narcotics Enforcement agents conducting surveillance from separate vehicles spotted Macias standing in a restaurant parking lot at the intersection of Cole Road and Highway 111 in Calexico. A short time later, an Isuzu with Mexico license plates drove into the lot. The driver got out and briefly spoke with Macias. The driver then got back in the Isuzu and Macias got in the passenger seat of a Chevrolet parked a few yards away. The Chevrolet was registered to Manuel Gallegos and Margarita Lopez.<sup>1</sup> The driver of the Chevrolet was a Hispanic male; however, the agents could not see him well enough to identify him.

The agents followed the Chevrolet from the restaurant parking lot to a nearby department store parking lot. A couple of minutes later, a Ford arrived and parked in front of the Chevrolet. Macias got out of the Chevrolet and went to the passenger side of the Ford. He carried a small package in one of his hands. He leaned in the passenger side of the Ford, placed the object inside, returned to the Chevrolet, and got in the car. Both vehicles then left the parking lot.

---

<sup>1</sup> Margarita Lopez is the name of Macias's wife.

One agent followed the Ford to the Mexico border. The agent stopped the surveillance when the Ford entered Mexico. The other agent followed the Chevrolet for about five minutes before stopping the surveillance. Both agents then returned to the intersection of Cole Road and Highway 111.

Approximately an hour later, the agents saw a tractor truck pulling a shipping container (together, semitrailer) traveling north. "Macias Trucking" appeared on the side of the tractor truck. A minivan owned by Macias and his wife and driven by Macias followed directly behind the semitrailer.

The agents followed the two vehicles north on Highway 111 and then onto Highway 86. When the vehicles approached a United States Border Patrol checkpoint, the minivan sped ahead of the semitrailer. Border patrol officers stopped the minivan at the checkpoint and waved the semitrailer through it.

The agents followed the semitrailer to the Riverside County border, where Riverside County Sheriff's investigators continued the surveillance. The investigators followed the semitrailer as it drove north on Highway 86. They noticed Macias's minivan speed toward, catch up to, and follow approximately four feet behind the semitrailer for about a mile. The minivan then sped around the semitrailer and got approximately a mile ahead of the semitrailer before slowing down, dropping back, and following closely behind it again. The minivan appeared to be driving in tandem with the semitrailer.

At one point, the minivan and one investigator's vehicle were stopped at a red light next to each other. The investigator looked into the minivan and saw the silhouette of a heavy-set male. After the light changed, the minivan continued northbound. The

minivan left the expressway in Coachella, at which point the investigator discontinued surveillance to avoid detection.

A California Highway Patrol (CHP) canine officer was then called to the area. The officer noticed the semitrailer was exceeding the speed limit and weaving from side to side. The officer stopped the semitrailer and contacted the driver, Manuel Gallegos. Gallegos provided the officer with the registration for the tractor truck, but could not produce the registration for the shipping container. Gallegos appeared extremely nervous and a little bit agitated. His hands were visibly shaking and his forehead was sweating profusely.

The officer asked Gallegos what he was carrying and Gallegos said used tires. The necessary placards for transporting used tires were not displayed on the semitrailer. In addition, Gallegos did not have a bill of lading indicating the weight and description of his cargo.

The officer asked Gallegos if he had any hazardous materials, contraband, or illegal immigrants in the shipping container. Gallegos said he did not. The officer also asked Gallegos if he was carrying any illegal drugs. Gallegos hesitantly replied, "I don't think so." Gallegos explained that he did not see what was loaded in the shipping container, but was told it was loaded with tires.

The officer asked for permission to search the semitrailer and Gallegos consented. The officer then got his dog out of his patrol vehicle and had the dog sniff the semitrailer's exterior. The dog alerted to the right front of the shipping container and the left rear of the tractor truck. The officer then searched the semitrailer.

Inside the shipping container, the officer smelled a strong odor of marijuana. He saw tires and numerous packages of what appeared to be marijuana. The semitrailer was towed to the CHP's Indio office, where the Riverside County Sheriff's investigators who had followed it earlier were waiting for it to arrive. When it arrived, one of the investigators assumed control of the investigation and the other law enforcement officers documented and unloaded the contents of the shipping container. The officers collected 334 packages, collectively containing 5,446 pounds of marijuana.

Approximately a week later, the lead investigator met with Macias and his attorney to determine whether Macias owned the semitrailer and whether he knew what had happened with it. Macias said he purchased the tractor truck from Swift Transportation (Swift), but had not yet transferred title to his name. He gave the tractor truck's keys to Gallegos, whom he had known for three or four years, so Gallegos could drive it to Swift's yard in Fontana as Swift needed to remove some equipment from it. Macias said he could not drive the tractor truck himself because of a problem with his medical card. Macias was to pick up Gallegos from Swift's yard the following day; however, when Macias arrived at the yard, he could not find the tractor truck or the shipping container. He tried to contact Gallegos, but could not reach him.

According to Macias, the tractor truck was supposed to be connected to one of Swift's shipping containers. The shipping container actually connected to the tractor truck had been reported missing from a lot in Calexico not far from Cole Road and Highway 111. Neither Macias nor Gallegos had permission to use the shipping container.

Macias also said that, while Gallegos was supposed to be driving to Fontana, he ran some errands for his son's birthday party and drove to Coachella to do some gambling at a casino there. Although he took the turnoff to the casino, he never actually went in it because his wife called him and asked him to return home to help prepare for the party. He denied ever seeing his tractor truck on the highway.

The Coachella casino was more than 100 miles from Macias's home. There was another casino much closer to Macias's home.

A couple of days before meeting with the lead investigator, Macias contacted Swift to inquire whether the company had the tractor truck. Macias told one of the company's security investigators that he had hired a friend to take the truck to Phoenix to return the license plate and permit back to the company.

Around the same time, Gallegos called Macias and asked Macias, "why [Macias] had done this to him." Macias did not respond and hung up because "he did not want to get into it with him."

After a lengthy hearing under Evidence Code section 402, the trial court allowed a Riverside County Sheriff's investigator to testify as an expert witness on counter-surveillance techniques used by drug transporters. The investigator described two such techniques. One technique involves a drug transporter driving in a special way to determine if the transporter is being followed. The other technique involves both the transporting vehicle and a secondary vehicle. The secondary vehicle follows the transporting vehicle to see if the transporting vehicle is being followed. The secondary vehicle may also speed ahead of the transporting vehicle in areas of suspected

surveillance to divert the attention of law enforcement officers so that the transporting vehicle can proceed unimpeded. The investigator opined that the facts of this case were "a classic description of a counter-surveillance car that was traveling to protect a load that was in the [semitrailer]."

### *Defense Evidence*

Macias's wife authenticated various pictures of Macias taken around the time of the incident to show Macias was not heavy-set then. One of the California Bureau of Narcotics agents involved in the surveillance activities testified he did not document the license plate of the shipping container; however, he described the container in his report and confirmed the shipping container he saw was the same shipping container found loaded with marijuana. The investigator who was able to see inside the minivan confirmed he saw a heavy-set male driving the minivan. The investigator acknowledged he could not see the man's face. Instead, he concluded from other information, including another investigator's identification, that the man was Macias. The lead investigator testified he did not direct the law enforcement officers who removed the marijuana bundles to wear gloves in order to preserve fingerprint evidence.

## DISCUSSION

Macias contends the trial court prejudicially erred in allowing the expert testimony on counter-surveillance techniques as this evidence was inadmissible profile evidence. We review a trial court's decision to admit expert witness testimony for abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1222.)

"A profile ordinarily constitutes a set of circumstances — some innocuous — characteristic of certain crimes or criminals, said to comprise a typical pattern of behavior. In profile testimony, the expert compares the behavior of the defendant to the pattern or profile and concludes the defendant fits the profile." (*People v. Prince, supra*, 40 Cal.4th at p. 1226.) In other words, the expert " 'attempts to link the general characteristics of [a particular type of criminal] to specific characteristics of the defendant.' " (*Ibid.*, italics omitted.)

Although characterized as profile evidence by Macias and by the People below, the expert testimony at issue here is arguably not profile evidence because the expert did not seek to tie the general characteristics of drug transporters to Macias's specific characteristics. (*People v. Prince, supra*, 40 Cal.4th at p. 1226.) Instead, the expert testimony is more like criminal *modus operandi* evidence, in which an expert testifies about the usual methods or procedures employed to commit particular crimes. (*Id.* at pp. 1223-1224.)

Assuming the expert testimony is criminal *modus operandi* evidence, we have no difficulty concluding the trial court properly admitted it. California and federal courts have long allowed experts to provide criminal *modus operandi* evidence and, within this category, federal courts have specifically allowed experts to provide evidence of counter-surveillance driving techniques used by drug transporters. (*People v. Prince, supra*, 40 Cal.4th at pp. 1223-1224; *United States v. Gil* (9th Cir. 1995) 58 F.3d 1414, 1421-1422;



*United States v. Maher* (9th Cir. 1981) 645 F.2d 780, 783-784.)<sup>2</sup> As the California Supreme Court recognized, "modus operandi evidence ' ' "helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." ' ' " (*People v. Prince, supra*, 40 Cal.4th at p. 1224.) Such evidence "may be helpful to the jury even if the modus operandi is not particularly complex." (*Ibid.*)

Assuming the expert testimony is profile evidence, we still discern no error in its admission. Profile evidence is not inevitably inadmissible. Rather, it is inadmissible only if it is irrelevant, lacks a foundation, or is more prejudicial than probative. (*People v. Smith* (2005) 35 Cal.4th 334, 357.) Macias does not directly dispute the relevancy of or the foundation for the expert testimony, nor could he reasonably do so. The expert testimony was relevant because it bore directly upon whether Macias aided and abetted the transportation and possession of the marijuana. In addition, the expert's many years of training and experience investigating similar cases amply qualified him to render an opinion about whether driving activities like Macias's were counter-surveillance measures.

---

<sup>2</sup> See also, e.g., *United States v. Gutierrez-Castro* (9th Cir. 2009) 341 Fed.Appx. 299, 301 (law enforcement officer's testimony explaining how drug traffickers sometimes drive cars in tandem and cooperate to evade law enforcement was permissible modus operandi evidence). Although the Ninth Circuit did not select this case for publication, state court rules permit us to cite to unpublished federal court opinions. (Cal. Rules of Court, rule 8.1115; *In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18.) We do so here to further illustrate the admission of expert testimony about counter-surveillance techniques used by drug transporters is not a remarkable occurrence.

Macias instead contends the expert testimony was more prejudicial than probative. We disagree. Profile evidence is insufficiently probative when "the conduct or matter that fits the profile is as consistent with innocence as guilt." (*People v. Smith, supra*, 35 Cal.4th at p. 358.) In this case, the evidence shows Macias drove his minivan in tandem with the semitrailer more than a 100 miles along two highways from Imperial County to Riverside County. Macias owned the tractor truck part of the semitrailer and his name appeared on the side of it. He hired Gallegos to drive the tractor truck, which was pulling a recently stolen shipping container loaded with over 5,000 pounds of marijuana. When the two vehicles approached an open border checkpoint, Macias sped his minivan ahead of the semitrailer. As Macias was diverted for a secondary inspection, the semitrailer was able to proceed unimpeded. A short time later, Macias caught up to the semitrailer and drove his minivan very closely behind it. He then sped the minivan about a mile ahead of the semitrailer, before slowing down, dropping back and resuming a close pursuit until exiting the highway in Coachella. After law enforcement officers discovered the marijuana in the shipping container, Macias gave conflicting versions of events: he told the lead investigator the semitrailer was supposed to be headed to Fontana for equipment removal, and he told Swift's security investigator it was supposed to be headed to Phoenix for its license plate and permit to be returned. In addition, when Gallegos confronted him about what occurred, Macias hung up on him without responding. Given these facts, we cannot conclude Macias's conduct was as consistent with innocence as guilt. We, therefore, conclude the trial court did not abuse its discretion in admitting the expert testimony.

DISPOSITION

The judgment is affirmed.

---

McCONNELL, P. J.

WE CONCUR:

---

McINTYRE, J.

---

IRION, J.